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Fourth report of the independent expert on the right to development, Mr. Arjun Sengupta, submitted in accordance with Commission resolution 2001/9

Mission to the Organization for Economic Cooperation and Development, the United Kingdom of Great Britain and Northern Ireland, the International Monetary Fund, the World Bank, the United States of America and the Netherlands

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Introduction

1. In its resolution 2001/9 the Commission on Human Rights requested the independent expert to clarify further the proposed "development compact", taking into consideration views expressed during the two sessions of the Working Group on the Right to Development and in broad consultation with the Office of the High Commissioner for Human Rights and the United Nations funds and programmes, as well as specialized agencies, relevant international and regional organizations, non-governmental organizations and, in particular, those actors and States interested in developing pilot projects in this regard, keeping in mind:

(a) The ongoing bilateral, regional and multilateral development cooperation programmes;

(b) The formulation of an operational model for the "development compact";

(c) The views of concerned international organizations and agencies and relevant regional institutions and actors;

(d) The need to ensure its added value to and complementarity with the relevant existing mechanisms;

(e) The need to address and remedy the national and international dimensions of corruption;

(f) The need for country-specific studies both from a national and an international perspective.

2. The objective of the mission was to elaborate upon and gather support for the independent expert's notion of a development compact.

I. FOURTH REPORT OF THE INDEPENDENT EXPERT

3. In response to the resolution, the independent expert submitted his fourth report to the third session of the open-ended Working Group on the Right to Development (E/CN.4/2002/WG.18/2). In that report, the independent expert reviewed his concept of the right to development and developed further the understanding of the national and international dimensions of the right to development. In particular, the independent expert elaborated upon the notion and the operational aspects of the development compact.

4. The development compact fixes obligations at both the national and international levels. At the national level, countries may voluntarily enter into a development compact. In doing so, they undertake to elaborate a development compact through participatory and transparent development programming that focuses, initially, on a few rights. The country concerned will choose which rights to focus on to begin with. To illustrate how the development compact would operate, the independent expert chose the realization of three rights - food, health and education - and poverty reduction. This programme would make it possible to establish what kind of international cooperation and what international assistance was needed. The

Development Assistance Committee of the Organization for Economic Cooperation and Development (OECD/DAC) would co-coordinate a support group composed of the World Health Organization (WHO), the Food and Agriculture Organization of the United Nations (FAO), the United Nations Children's Fund (UNICEF), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Development Programme (UNDP), international financial agencies like the International Monetary Fund (IMF), the World Bank and the regional development banks, and interested donor countries. This group would enter into a dialogue with the country in question based on the development programme already developed. In addition to coordinating this group, DAC would coordinate the required international cooperation and the funding arrangements as well. For funds, the development compact would draw from a pool of "callable", i.e. pledged but unattributed funds, official development assistance (ODA) that the DAC would administer. The pool would have a target of around US$ 50 billion - a figure taken from the predictions made in the context of the Millennium Summit and would be constituted on the basis of country contributions to be calculated. The independent expert has included as an annex to his fourth report two possible breakdowns for sharing the burden among OECD members.

II. THE MEETINGS HELD DURING THE MISSION

5. During his mission the independent expert held meetings with officials of some major bilateral donor countries (the United Kingdom Department for International Development, the United States Department of State, the Government of the Netherlands), as well as concerned international organizations (OECD, IMF, World Bank). The following paragraphs contain a brief outline of the meetings held and a summary of the discussions at each meeting, and sets out some general observations. A member of the Secretariat accompanied the independent expert.

A. The Organization for Economic Cooperation and Development

6. There was a general appreciation among the staff of the OECD of the development compact as a possible move forward in both the thinking on development assistance and on the right to development. The Chairperson of DAC indicated that there is greater support now amongst many OECD member countries for increasing ODA, and OECD staff members generally noted that the notion of a rights-based approach to development was both appealing and consistent with current trends in development thinking.

7. The most common observation concerned the institutional arrangements for the development compact. DAC is a consensus committee organized to assist donors at a policy level and does not have operational activities. It also has a relatively small secretariat. Consequently, the development compact, if accepted, would probably require a review of the composition and functions of DAC. Some participants suggested that the development compact model coordinated by DAC should be only one possible model and that there could be alternative models with other organizations. The independent expert noted that DAC provided a helpful model as a committee of donor countries which has the confidence of other concerned organizations such as the World Bank and the IMF. He also believed that DAC would be the most appropriate body to "call in" financial contributions from donors.

8. One issue raised was the importance of linking the development compact with other processes. The relevance of the New Africa Initiative and the Third United Nations Conference on the Least Developed Countries held in Brussels in 2001 was also raised. Another significant process is the preparatory process for the International Conference on Financing for Development to be held in Monterey, Mexico, in March 2002. A participant noted that the process has included the notion of mutual accountability in development assistance between donors and beneficiaries - which, he observed, was closely linked to the independent expert's notion of a development compact.

9. The concept of making committed financial assistance an obligation was both praised as well as queried. In particular, it was noted that donors like to maintain control over the amounts and the direction of assistance. However, it was also noted that any model that promotes consistency in development assistance is worth pursuing. A participant suggested that donors should not be seen as only OECD member countries. Large developing countries are also in a position to contribute, financially and otherwise, to international development assistance. There was interest expressed in knowing more about the form and powers of any enforcement mechanisms included in the development compact model.

10. Several other issues were raised, for example, the need to consider what would happen if the development compact goes wrong - if, for example, in the second year, a less democratic Government takes power. The independent expert was asked why environmental protection had not been included along with food, health care and education. It was noted that the development compact should not limit itself only to ODA, but should also look at technology transfer, global public goods, as well as global taxation.

B. The United Kingdom Department for International Development

11. DFID held a round-table meeting for the independent expert. The independent expert encouraged the participants to reflect on his development compact proposal and to transmit those reflections to the United Kingdom representative in the Working Group.

12. Significantly, DFID has a project for development cooperation between the United Kingdom and a developing country that takes a rights-based approach and which could provide a model at the bilateral level for what the independent expert is proposing as the multilateral development compact. The project is based on a Memorandum of Understanding that outlines mutual obligations on behalf of all players and includes an independent monitoring mechanism in the form of experts who review the project and submit reports. It was suggested that this model could be examined further to explore its compatibility with the development compact.

13. There was discussion of the need to consider appropriate enforcement mechanisms for the development compact. A specific example was raised of a country where a judicial review was undertaken of an administrative decision to construct a road, despite which the construction was never undertaken owing to corruption at the level of the local authority. The judge issued an order to complete the project, an example of a judicial mechanism being used for development

issues. The importance of ensuring that fiduciary responsibilities are carried out is essential - the question is how to develop a mechanism to do this. The project mentioned above had two levels of development aid: the first - a higher level of assistance - would continue if the beneficiary country met its end of the bargain; the second, lower level of assistance would be given should the country fail to do so.

14. The independent expert was asked what the relationship would be between the development compact and the Poverty Reduction Strategy Papers (PRSPs). The development compact should not be a step backwards from PRSPs in that PRSPs are expected to be locally owned while the development compact model requires the approval of the national development authorities. Further, PRSPs are encouraging a move away from donors picking and choosing among development assistance projects, towards more equitable and transparent support for national budgets. It was also noted that developing countries do not always perceive that they do in fact own PRSPs, and the development compact might more effectively ensure country ownership. The independent expert also noted that PRSPs do not make an express link to human rights - another issue which demonstrates an advantage of the development compact model.

15. The issue of donor contributions was discussed using two models: either a "kitty" of development funds exists and countries elaborate their development programmes subsequently or countries elaborate their development programmes first and donors contribute funds to a pool subsequently. The independent expert felt that these two models need not be mutually exclusive. While a general pool of funds can be established with "callable" funds, the amount that would be available from that pool to individual countries could be determined subsequently, based on the requirements of the country's specific development compact.

C. The International Monetary Fund

16. The meeting with IMF staff began with the independent expert briefly outlining his concept of the development compact and the support group. The IMF staff were generally receptive to the ideas in the report but voiced several concerns. In particular, it was noted that the development compacts would be based on a collective agreement, that each organization can only act within its mandate, and that the development compacts could result in a loss of sovereignty for the IMF. The independent expert replied that the support group would act in accordance with the mandates of all its members. He explained that the IMF could participate in the support group process without violating its mandate.

17. It was also noted that human rights law does not cover all aspects of development, especially the concerns about fiscal discipline and macroeconomic balance. The independent expert replied that the right to development broadens a rights-based approach by bringing "G" (growth) into the analysis. Thus, sustainability and macroeconomic stability have clear roles in the human rights approach to development. The independent expert also noted that the right to development goes beyond simple growth and looks at development as an expansion of opportunities, which is the added value of the right to development approach. He stressed that sustainability, macroeconomic stability and growth are all fundamental to the development compact.

18. An IMF staff member noted that any decision on development compacts must come from the countries themselves. If convinced, the IMF members would approach the Fund to encourage its participation. The independent expert agreed that the process must be country driven. He pointed out that under his proposal the negotiations for a development compact would only start when a country approaches the international community and agrees to accept the obligations of the international community.

19. The same person asked what the difference was between the development compact and the PRSP process, but answered his own question by noting that the PRSPs would never impose any obligations on the IMF to do something.

20. Much of the conversation focused on the notion of international cooperation as an obligation. The IMF Executive Directors have fiduciary duties to the member States, which are extremely important, and the participants at the meeting saw the development compact as conflicting particularly with these duties. The independent expert acknowledged that the IMF is bound by what the IMF Executive Board decides, and expressed the view that human rights does not stand in opposition to strict monetary discipline. He pointed out that IMF representatives could sit on the support group, which should help ensure that it does not conflict with the IMF Executive Board.

21. Several participants questioned the notion that human rights carried obligations beyond the national State. The participants also focused very much on human rights violations - for example, they noted that the IMF did not see blocking a programme because of human rights violations as appropriate. The independent expert stressed that the development compact required developing countries and international institutions to fulfil their promises. He reiterated that the development compact focuses on ensuring that international institutions uphold their commitments to developing countries, but this does not mean that developing countries can ignore their commitment.

22. When the independent expert asked what the official position of the IMF was, an IMF participant replied:

(a) The IMF can only act within the bounds of its expertise and its mandate;

(b) The IMF could not accept that it was under any obligation to act in any way other than according to its obligations to its members. The Board of the IMF takes the final decision on its actions, and it is only the Board that can decide on taking a human rights approach to its programme;

(c) The IMF may not be directly involved in the development compact but could accept links between the development compact and the PRSPs, if specifically asked by the Board.

23. It was agreed that dialogue on these issues should continue and that the IMF would endeavour to send a representative to the next meeting of the Working Group.

24. A further meeting raised the issue of whether it was a good idea to bring DAC into the process and asked whether the UNDP Round Tables might not be a better venue. The independent expert responded that DAC involvement was merely a suggestion and that he was open to suggestions to amend or improve on his proposal. He simply wants the discussion on it to begin.

25. A participant also asked whether the development compact would also bring in global public goods concerns, to which the independent expert replied that the focus would be more on meeting the 2015 development targets.

D. The World Bank

26. Three meetings were held at the World Bank.

27. The meeting with one representative of the World Bank focused on the difficulties that the World Bank has with using rights language. The use of rights language could be problematic and could harm the growing consensus on social development if overemphasized. He said that there was both a philosophical and a political side to human rights and on the political side, human rights carry great force but the right areas must be chosen so that a strategy can be developed. In this regard, he proposed the right to education and the right to health as two areas that had clarity and could form the basis of development strategies. The call for free primary education, while still distant for many, had political resonance. He referred the independent expert to a note from the President of the World Bank presented at a recent meeting indicating the Bank's most recent position, which could be relevant to development compacts.

28. The following meeting focused on operational aspects of the PRSP programme. Reference was made to a recent World Bank statement which mentioned the development compact, and even referred to the need for nationally designed development programmes that are backed up by international commitments to cooperation. The independent expert added that his support group proposal builds on this. A participant noted that the Bank had stated that no good PRSP would go unfunded. The participant suggested links between the Bank's approach and a human rights approach, taking as an example the Bank's focus on education as empowerment, not just an investment in the poor. The participant responded to the independent expert's development compact suggestion in the following terms:

(a) International initiatives should not be duplicative;

(b) Development compacts must be achieved country by country;

(c) The best mechanism for ensuring that funding commitments are maintained might not involve DAC as co-coordinator of the support group. He suggested that the IMF might be more representative given its wider membership;

(d) The World Bank itself is using the US$ 50 billion figure that the independent expert mentioned in his fourth report.

29. A participant noted two issues that need further consideration:

(a) What happens when the chance of countries meeting their goals or improving on them is close to zero?

(b) What happens when another entity outside the State is at fault for the State's not meeting goals?

30. The participant also noted that donor countries are now much more willing to do something about poverty and to raise ODA than in previous years. However, some countries are not. Part of the opposition is due to the belief that increasing ODA might not necessarily be a positive thing.

31. The participant proposed the following process as a way forward: the independent expert's paper should be reviewed by the three relevant groups at the Bank - senior advisers, the poverty team and external affairs. The issues the Bank is likely to raise for further consideration are: the notion of international cooperation as an obligation, as proposed by the independent expert, and the improvement of good global governance.

32. Participants in further meetings discussed human rights-based approaches to development with interest, noting that human rights bring a wider focus to their development work (for example, the need for functioning and independent judicial structures). They noted that the Bank has commissioned a study from the Overseas Development Institute in London on "claiming our rights".

33. Much of the discussion focused on the similarities between a World Bank approach to development and a human rights approach. One participant noted that the Bank's work on indigenous peoples already made explicit reference to the cultural and social rights of indigenous peoples. Participants noted that the World Bank and the Commission on Human Rights have different perspectives, but that is what makes a coalition credible - together they can be more effective.

34. Another participant gave the example of a development project in one country that was actually already an operationalization of the development compact. The project was based on accountable bilateral and multilateral development assistance that included commitments to provide finance and ensured the right of any party to "inspect the books" at any time. The project eventually finished after five years owing to changing priorities of the Government. The accountability mechanism on the donor side consisted of a set of indicators based on financial commitments and the harmonization of procurement. One issue that was raised was that when a State does not meet its commitments the Bank sometimes continues to provide finance because without it, the future of the programme might be in jeopardy. This is, however, a difficult judgement to make as it might also have the result of sanctioning the State's violation.

35. The independent expert stressed the need for developing countries to be able to rely on commitments made by donors and the need to have a form of enforcement mechanism that applies to the donor. With respect to enforcement mechanisms, the participants spoke of the Inspection Panel of the Bank as well as the Consultative Groups. The Inspection Panel is like

the ombudsman of the Bank and is charged with looking at current problems at the Bank, not only past problems. It is made up of independent officials. The Consultative Groups have changed significantly in recent years.

E. The United States Department of State

36. The independent expert held a meeting at the State Department.

37. The meeting opened with the independent expert explaining his role and presenting his views on the right to development. He emphasized that the right to information is key to realizing the right to development. He said that at this stage he is interested in forming an international group of experts to discuss the development compact and support group proposals presented in his fourth report.

38. Several participants noted that what the independent expert is proposing is more or less in line with the thinking of many donor countries. However, they noted that it is the beneficiary countries that resist the introduction of human rights into development.

39. One participant noted that the right to development is a difficult issue for the United States as the Government believes that there is a split between the two sets of rights enumerated in the two Covenants. The United States has problems with the economic, social and cultural rights, and a participant noted the belief that economic, social and cultural rights are not justiciable. The United States sees economic, social and cultural rights leading to a situation where the developed countries are the locus of action to bring about development rather than focusing on the developing country level. Yet he gave the example of one country where corruption, starting at the top, was the biggest hurdle for that country's development. The United States sees the United Nations Conference on Trade and Development and even the International Conference on Financing for Development as focusing on international cooperation, in particular financial assistance, to the neglect of national action; the United States believes there is a need to get away from this.

40. Another participant raised the issue of the appropriate body to coordinate the support group. He doubted that DAC would be appropriate as it does not have human rights experience. In fact, he said that the only body with competence would be the Commission on Human Rights, but questions were raised as to the ability of the Commission to act as the coordinator of the support group. The independent expert felt that there should be someone from the Commission appointed to the support group. He explained that DAC is only a suggestion, but its merit is that it is an organization of donor countries; the Commission would not be appropriate as it consists of both donors and beneficiaries.

41. A participant noted that the State Department is intending to review its policy on the right to development and economic, social and cultural rights, but that it has not yet done so. The independent expert encouraged them to participate actively in the Working Group - not necessarily to agree to the development compact, but to agree to further discussion on it, most likely through the establishment of an expert group. He also welcomed the news that the State Department is going to review its policy on economic, social and cultural rights.

F. The Netherlands

42. The independent expert met with staff of the International Cooperation Department and the Ministry for Foreign Affairs dealing with human rights, good governance, sustainable economic development, poverty and international financial institutions.

43. One participant's main concern was to avoid any duplication of the development compact with other processes that are already in existence such as the Country Development Framework (CDF)/PRSP. In response, the independent expert identified five general differences. First, the IMF and the World Bank do not use the language of human rights. Second, as a consequence of using rights language, the development compact brings into play obligation - at both the national and international levels - including a monitoring mechanism. Third, while with the PRSP process, the country sets out its programme and then the money is found, under the development compact, the fund is in existence and the country sets up its own programme, so the money is already there, in a sense. Fourth, it is not just the IMF and the World Bank that are making judgements - the support group (which will include a member appointed by the Commission on Human Rights) will be the adjudicating body. Fifth, the development compact - by virtue of its rights base - will be more comprehensive than the PRSP as it will focus also on civil and political development, bringing into the strategy issues such as the development of the judicial system.

44. The participant also asked where the incentive for developing countries is? He said that, while much of what the independent expert was saying is in line with the thoughts of many of the donors, the beneficiary countries are far less enthusiastic about rights-based approaches to development. The independent expert replied that he is aware of this, but he also cited the case of India, where there is increasing public interest legislation and judicial activism in the field of human rights.

45. Finally, the participant stated that he doubted that there would be any new Funds, as better use needed to be made of existing ones. However, he was willing to consider the independent expert's ideas further and would certainly give thought to supporting a move for greater discussion of the development compact, for example through an expert group, as proposed by the independent expert.

46. The following questions were put to the independent expert:

(a) What was the added value of the right to development?

(b) Is there a consensus on human rights as there is on the need to fight poverty?

(c) What is the relevance of equity? Is it possible within a human rights framework to speak of poverty eradication while at the same time admit further increases in income disparity?

(d) What is the role of the State and can the State fulfil its role under the development compact, considering that the State is getting smaller and other actors are involved in promoting or violating human rights?

(e) Why has the independent expert decided to focus on food, health and education, when there are many other issues that are also crucial to development, such as cultural rights, be they for indigenous peoples or for women?

(f) Are there already too many mechanisms for development; should we not be focusing on getting human rights into existing mechanisms?

(g) Is there really a developing country commitment to promoting and protecting human rights?

III. OBSERVATIONS

47. The mission was characterized by frank, in-depth discussions about how to translate the independent expert's recommendations into reality. While participants at each of the meetings raised many issues concerning the independent expert's development compact approach, the following issues stood out.

48. The World Bank emphasized a positive connection between the PRSP process and a rights-based approach to development. While the meeting with one World Bank participant focused on the difficulties associated with using the language of human rights, the following meeting with other participants seemed to suggest that the Bank's current PRSP approach mirrors the independent expert's development compact approach, even down to the adoption of the term "development compact". Nonetheless, the independent expert emphasized that the development compact brings the notion of rights and obligation into the development process, which is a significant addition to the PRSPs.

49. There was great interest in how the development compact would interact with PRSPs. There were several meetings at which participants raised the fear that another mechanism would duplicate existing mechanisms such as PRSPs. However, the independent expert emphasized the differences between the two - most clearly in the meetings in the Netherlands - and noted that there is no reason why the development compact could not be an addition to PRSPs - a coalition rather than competition. DFID warned against the development compact being weaker than the PRSP process. The IMF was also unclear on the relationship between the development compact and PRSPs. The independent expert explained that developing countries do not often perceive the PRSPs as their own, in spite of the fact that country ownership is meant to be the cornerstone of PRSPs. The World Bank spoke of the PRSP process and the independent expert's development compact as if they were the same thing.

50. A contentious issue coming from the report of the independent expert was the notion of international cooperation as obligation. This raised problems for many participants. Several participants, while interested in the notion of international cooperation as an obligation, wondered what the appropriate enforcement mechanism would be. In this sense, it would be interesting to make a case study of DFID programmes that use human rights-based approaches. While they do not have a judicial enforcement mechanism, the programme's reporting structure uses independent experts appointed by both parties. On the basis of the reports, assessments are made as to the future of the programme.

51. The independent expert's choice of DAC as co-coordinator of the support group was a source of much discussion. The independent expert made it clear in all meetings that DAC was not central to his proposal and that he welcomed other suggestions and discussion on this point. Participants at the OECD noted that this would be a new role for DAC which would turn an essentially policy-oriented body based on consensus into an operational body. This would have important resource and policy consequences. Several participants at the OECD as well as the IMF noted that other models could be proposed, for example using the UNDP Round Tables as the coordinator of the support group. The United States State Department asked why DAC was making judgements on human rights issues when it had little human rights experience. The independent expert welcomed input on this issue whenever it was raised, noting that he was interested in starting a dialogue.

52. It was interesting to see that the World Bank, while not using a human rights framework for development, was, however, prepared to discuss certain economic and social rights - the right to health, to food and the right to education, and cultural and social rights of indigenous peoples.

53. While most participants did not commit themselves, the independent expert's proposition that the development compact idea be explored through the appointment of an expert group was taken seriously.

54. It was also interesting to see how the parties placed themselves. For example, DFID and the interlocutors in the Netherlands, the OECD and even the World Bank were enthusiastic listeners and - while not committing themselves to the development compact - suggested that the idea certainly was consistent with current development thinking. The United States State Department tacitly seemed to agree to consider the idea of continuing discussion on the development compact without actually committing itself to it. Only the IMF was critical of it, although this stance was taken more from a position of institutional sovereignty rather than a direct criticism of human rights or the development compact. Interestingly, several participants at various meetings raised the question of how much support the development compact would get from developing countries, suggesting that greatest resistance might come from them.

IV. CONCLUSIONS

55. In the view of the independent expert, the following issues need greater attention:

(a) The relationship between the development compact and PRSPs;

(b) The relevance of areas of development other than health, food and education in the development of compact, e.g. the environment and indigenous peoples' rights;

(c) The most likely partner to play the role of co-coordinator of the support group: DAC, UNDP Round Tables, ILO, IMF Consultative Groups - or something else?

(d) The likely reaction of developing countries to the proposal;

(e) The need to consider specific case studies of existing "compacts" such as those of DFID as well as other cases mentioned involving the Swedish and Danish cooperation agencies SIDA and DANIDA;

(f) The composition and mandate of any group of experts appointed to elaborate the concept of the development compact.